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No. 84-1501

In the Supreme Court of the United States

October Term, 1984

JOHN E. GREEN PLUMBING & HEATING COMPANY, INC.,
Petitioner,

vs.

TURNER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly apply state law in affirming a directed verdict for respondent on the ground that petitioner had failed to prove damages with a sufficient degree of certainty?

2. Did the Sixth Circuit err in finding that the District Court's grant of summary judgment in favor of respondent on petitioner's negligence claim was harmless error under the circumstances of this case?

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STATEMENT OF THE CASE

Respondent Turner Construction Company[1] entered into a contract with the City of Detroit Building Authority ("DBA") on July 10, 1975, to serve as construction manager for the DBA in the construction of the Detroit General Hospital project. As construction manager, respondent was required to perform certain coordinating functions and to serve as an advisor to the DBA in the construction process.

1. Turner Construction Company is a subsidiary of The Turner Corporation.

In June 1976, the DBA awarded the plumbing contract to petitioner John E. Green Plumbing & Heating Co., Inc., one of numerous contractors on the project. Petitioner contracted directly with the DBA. Petitioner, like all other contractors on the project, had no contractual relationship with respondent, the construction manager.

On February 2, 1979, before completion of the hospital project, petitioner filed suit against respondent for damages allegedly resulting from delays in completion of the plumbing work. The complaint set forth two claims, (a) that respondent intentionally interfered with petitioner's performance of its contract with the DBA, and (b) that respondent negligently performed its duties as construction manager. The complaint sought the same damages under each claim.[2]

On November 19, 1980, the District Court granted summary judgment to respondent on the negligence claim on the ground that such claim was barred by the "no damages for delay" clause in the plumbing contract. *John E. Green Plumbing & Heating Company, Inc. v. Turner Construction Company*, 500 F. Supp. 910 (E.D. Mich. 1980).

Trial commenced on the claim of intentional interference in August, 1982. During the trial, petitioner's witnesses acknowledged that not all delays were caused by respondent, but many delays had been caused by the actions of the DBA and the architect in approving change orders, the actions and inactions of other contractors, disputes among contractors, and disputes between contractors and the architect. (See TV 3, pp. 111-112, 114, 118 *et seq.*; TV 6, pp. 92-95; and TV 7, pp. 33-34.)[3] Notwithstanding that the

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2. Petitioner revealed for the first time at trial that it sought as damages the total cost of performing the plumbing work in excess of its original bid price.

3. "TV" refers to Trial Volume.

delays claimed by petitioner were from multiple causes, petitioner's damage witness testified that his damage calculation was based on the premise that every item of delay experienced by petitioner was directly attributable to respondent's actions (TV 7, p. 80). Another of petitioner's witnesses admitted that he did not know how many of petitioner's man-hours on the project were attributable to contract work as opposed to change order work, for which petitioner had been paid by the DBA, and that petitioner would never be able to make that determination (TV 13, pp. 65, 79-80).

At the close of petitioner's case, the District Court directed a verdict in favor of respondent on two grounds. First, petitioner had failed to present any evidence that respondent had intentionally interfered with petitioner's work. Second, petitioner had failed to present any evidence from which a jury could determine without sheer speculation what damages, if any, had resulted from respondent's conduct, as distinct from the actions of others.

On appeal the Sixth Circuit held that the trial judge erred in dismissing the negligence claim on the basis of the "no damages for delay" clause, but that this error[4] by the District Court did not require a reversal of the judgment. The Court of Appeals found that petitioner had sought precisely the same damages under both the negligence and intentional interference claims, and that all damage testimony had been received into evidence during the intentional interference trial. There was no need,

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4. Petitioner misstates the decision of the Sixth Circuit by asserting that such court found two prejudicial legal errors had been committed by the District Court. Petition for Writ of Certiorari at 3. The only error found by the Sixth Circuit was that the District Court erroneously granted summary judgment based upon its interpretation of the effect of the "no damages for delay" clause.

therefore, to retry the case when the damage testimony was so deficient as to warrant a directed verdict for respondent on damages. The Court of Appeals held that the District Court correctly had directed a verdict against petitioner because petitioner failed in its proof as to damages allegedly caused by respondent, irrespective of the liability theories involved. Petitioner's evidence provided:

> "no basis for allocation of the lump sum [claimed] between those causes which were actionable and those which were not," making "it proper to reject the entire claim." *Lichter v. Mellon-Stuart Co.*, 305 F.2d [216] at 220 [(3rd Cir. 1962)].

John E. Green Plumbing & Heating Company, Inc. v. Turner Construction Company, 742 F.2d 965, 968 (6th Cir.), *reh'g denied* (1984).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petition Sets Forth No Reason Sufficient to Support Issuance of the Writ.

Rule 17 of the rules promulgated by this Court clearly states that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are "special and important reasons" therefor. Rule 17.1 lists the primary reasons that will be considered by the Court in exercising its discretion:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial pro-

ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * * * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition[5] sets forth no "special and important reasons," within the parameters of Rule 17.1, why this Court should exercise its discretion to review this case.

The petitioner does not assert that the decision below conflicts with the decision of another federal court of appeals, which is the first justification under Rule 17.1(a) for review by the Court.

Nor does the petition fall within the second reason specified by Rule 17.1(a) for review, which requires the decision to be in conflict with a state court of last resort on a federal question. Petitioner has not even asserted that the decision below conflicts with a decision of the Michigan Supreme Court; and, more importantly, there is no federal question involved in this case. This was a diversity action for common law tort damages allegedly incurred during construction of a municipal hospital project. The entire claim was derived from and governed by Michigan state law. Since no federal question is involved, the petition also does not raise either of the reasons for

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5. The original petition, presented for filing on March 6, 1985, was returned by the Clerk to petitioner as a result of defects in the form of the petition. The time for filing this brief in opposition thus was extended until thirty days after respondent's receipt, on March 25, 1985, of corrected copies of the petition.

review contained in Rule 17.1(c), each of which concerns only federal questions.

The only attempted justification proffered in the petition to support this Court's review of the issues is the argument that the Court of Appeals failed to follow Michigan law in reviewing the directed verdict against petitioner. An assertion that a federal court failed properly to apply state law is no longer a proper reason to ask this Court to review a case, such reason having been eliminated in the 1980 revision of this Court's rules. *Compare* Rule 19.1(b), Supreme Court Rules, effective July 1, 1970, with Rule 17.1(a), Supreme Court Rules, effective November 21, 1980. Furthermore, the "failure-to-follow-state-law" argument is totally lacking in merit here.

Petitioner has asserted here for the first time in the course of this litigation that the court below failed to apply a Michigan standard for reviewing a directed verdict, which petitioner now contends requires only "scant evidence" to create a jury question on an issue. Since petitioner failed to raise the "scant evidence" argument in the court below,[6] it should not be permitted to raise a new issue concerning the scope of state law for the first time before this Court. Additionally, the record and the decisions below contain no indication whatsoever that an improper standard of review in fact was utilized.

Petitioner also argues that the court below failed to apply Michigan substantive law regarding the "total cost"

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6. Petitioner relies on two state cases to support its "scant evidence" standard of review, *Stein, Hinkle, Dawe & Assoc., Inc. v. Continental Casualty Co.*, 110 Mich. App. 410, 313 N.W.2d 299 (1981) and *Miracle Boot Puller Co., Ltd. v. Plastray Corp.*, 57 Mich. App. 443, 225 N.W.2d 800 (1975). However, neither case was cited by petitioner in its Brief of Plaintiff-Appellant, the Reply Brief of Plaintiff-Appellant, or the Petition for Rehearing In Banc before the Sixth Circuit, nor was the "scant evidence" standard otherwise presented in those briefs.

method of proving damages in a construction case. Wholly apart from the fact that a federal court's application of state law generally does not provide a reason for granting a writ of certiorari, this argument is fatally flawed, because petitioner has not demonstrated that the total cost method in fact is part of the substantive law of Michigan.

The only case cited by petitioner for its hypothesis that the total cost method is part of the substantive law of Michigan is not even a Michigan state court case. *See United States for the Use of United States Steel Corp. v. Construction Aggregates Corp.*, 559 F. Supp. 414 (E.D. Mich. 1983). Furthermore, rather than establishing that the total cost method is part of Michigan substantive law, the district court in *Construction Aggregates* expressly noted the "lack of guidance from the Michigan courts on this method of damage calculation", *id.*, 559 F. Supp. at 427, and the court refused to apply the total cost method to the facts of that case. Thus, the only precedent is, if anything, contrary to petitioner's position; and there certainly is no basis presented for petitioner's argument that the court below failed to apply the correct state law for measuring damages.

Petitioner has failed to set forth a single appropriate reason to bring this case within that select group of cases for which there are sufficient "special and important reasons" for this Court to exercise its discretion in favor of review. Rule 17.1. The writ should be denied.

2. The Petition Does Not Raise Constitutional Issues, but It Only Seeks Routine Appellate Review of Issues Governed by Well Established Legal Rules.

The two Questions Presented in the petition are couched in terms of a "denial of due process of law," but even a cursory examination of petitioner's assertions reveals that no issues of due process are involved here.

In the first of its Questions Presented, petitioner asserts a denial of due process from the court's refusal to remand its negligence claim for trial. Once this Question is stripped of its constitutional hyperbole, it becomes clear that petitioner merely seeks to have this Court review the Sixth Circuit's determination of harmless error.

In the decision below, the Sixth Circuit recognized that petitioner sought at trial to recover the entire manpower and cost overrun in excess of its original bid estimates as its damages. However, the District Court correctly found that petitioner had failed to prove that the entire cost overrun was attributable to the conduct of respondent, and had failed to prove a basis for allocation of the cost overrun between those causes allegedly attributable to respondent and those that were not. Consequently, the grant of summary judgment on the negligence count, although deemed to be error, was harmless since petitioner sought no more or different damages than the same entire cost overrun, regardless of the liability theory, whether negligence or intentional harm.

Petitioner cited no authority for its proposition that a court's adverse ruling on a question of harmless error constitutes a denial of due process. That omission is quite understandable, because questions of harmless error are commonplace judicial determinations without constitutional implications. This Court's limited time and attention simply should not be taken up in reviewing issues of harmless error, regardless of whether or not the question is couched in terms of an asserted denial of due process.

Within its argument under the first Question Presented, petitioner also asserts that it was denied due process when the trial judge excluded some of its proposed

exhibits as a sanction. Not only is there no basis in law for petitioner's position, but the facts allegedly supporting that position are seriously misstated.[7] Furthermore, the order excluding proposed exhibits would not rise to the level of a denial of due process even if it were entered erroneously—which it was not.

In its second Question Presented, once that Question is reduced to its essence, petitioner merely requests a review of the evidence to determine whether the District Court properly directed a verdict against petitioner on the issue of damages. The District Court heard almost three weeks of petitioner's testimony, and the Sixth Circuit reviewed the lengthy record of trial. Each court weighed the evidence pertaining to damages, and each concluded that petitioner had failed in its proof of damages. Petitioner's disagreement with the weighing of such evidence by the courts below, however, does not raise the directed verdict issue to constitutional proportions. If such were the case, *every* grant of a directed verdict would have constitutional implications.

Rather than raising genuine constitutional issues for review, the petitioner's request for this Court's intervention involves routine appellate review on a question of harmless error, and sifting through a lengthy record, evaluating and reweighing the evidence of damages to determine if the trial court properly granted a directed

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7. Petitioner asserts that the judge excluded the proposed exhibits as a sanction based upon a finding that petitioner's counsel made a misrepresentation and that the trial judge later conceded error on this point. Petition for Writ of Certiorari at 11. These assertions are false. The record demonstrates that the sanction was imposed as a result of petitioner's direct violation of the court's duly entered pretrial order requiring marking and exchange of proposed trial exhibits. At no time did the trial judge concede any error, either as to his ruling or as to the factual basis therefor.

verdict. These are at best functions for the Circuit Court of Appeals. Certainly, neither issue is sufficiently important to the public to warrant any of this Court's time and attention. Clearly, this Court does not sit merely as another tribunal of errors and appeals, as the petitioner would have it become. Issuance of a writ of certiorari is not appropriate here.

3. The Court Below Gave Full Consideration to the Issues and Decided Them Correctly.

The court below did not speculate on petitioner's "damage proofs", as petitioner states in the first point of its argument. The Court of Appeals merely recognized that petitioner sought to recover the entire manpower and cost overrun in excess of its original bid estimates under its intentional interference count. Petitioner even admits that it "sought to recover its entire *out-of-pocket* loss from this one construction contract in the trial of its interference claim." Petition for Writ of Certiorari at 9 (emphasis in original).

It was evident from the complaint and the record that if petitioner sought to recover its entire cost overrun under the intentional interference count, petitioner could seek no more than the very same cost overrun under the negligence count. The damages claimed under each of these two tort claims are identical; the evidence to establish those damages under either liability theory is the same, and all such evidence had been admitted. The only difference between petitioner's two theories is the degree of culpability required to establish liability.

Petitioner's failure as a matter of law to prove damages with a reasonable degree of certainty under the intentional interference claim necessarily means that it

could have fared no better had it also been permitted to present its claim for liability under a negligence theory. The Sixth Circuit correctly held that the trial court's error in granting summary judgment on the negligence claim did not require a reversal of the judgment for respondent. The Court of Appeals was not required to speculate as to petitioner's "damage proofs," since all the damage testimony had been offered, and it still fell short.

Petitioner suggests that its proofs would have been different and more specific if it had tried the claim on a negligence theory—that it would have sought additional elements of damage pertaining to diminished business reputation and profits from other lost business opportunities. This suggestion is patently groundless. These elements of damage were never claimed in the complaint, and petitioner made no effort to adduce any such evidence at trial, despite having asserted every possible penny of loss connected with the plumbing work. The Sixth Circuit correctly concluded that petitioner's damages would not have been more expansive in a negligence action than in the intentional interference action, since there are no elements of damage that could have been asserted in a negligence claim which could not also have been asserted in the intentional interference claim.

The Sixth Circuit also correctly refused petitioner's invitation to apply the total cost method of determining damages. The evidence at trial irrefutably established that not all delay or interference was attributable to respondent's alleged improper conduct. Some delay was attributable to actions of the owner, the architect and other contractors, as well as to petitioner itself. Further, petitioner was unable to establish what portion of its claimed extra man-hours were attributable to change or-

ders for which it had been reimbursed by the project owner.

As noted by the district court in *United States for the Use of United States Steel Corp. v. Construction Aggregates Corp.*, 559 F. Supp. 414 (E.D. Mich. 1983), cited by petitioner, there is "potential harm" in utilizing the total cost method because it "would permit [plaintiff] to recover all losses notwithstanding their nature or cause", and to permit such recovery "would force [defendant] to pay for loss it did not cause". *Id.*, 559 F. Supp. at 427. The total cost method cannot be utilized where the defendant is not responsible for all the delay or added expense, *id.*, such as in this case.

The evidence here precluded application of the total cost method of determining damages. The court below correctly weighed petitioner's unreliable, chaotic and indiscriminate damages evidence and concluded that petitioner had failed to prove a basis for allocation of the lump sum claimed between those causes which were actionable and those which were not, thereby making it mandatory to reject the entire claim. *John E. Green Plumbing & Heating Co., Inc. v. Turner Construction Company, supra*, 742 F.2d at 968, citing *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3d Cir. 1962). *Accord, United States for the Use and Benefit of Shields, Inc. v. Citizens and Southern National Bank of Atlanta, Georgia*, 367 F.2d 473 (4th Cir. 1966).

The petitioner presented no evidence from which a jury could have assessed damages against respondent without resorting to speculation, guess or conjecture. The Sixth Circuit correctly affirmed the directed verdict against petitioner on the issue of damages. There is no warrant to have that appellate determination reviewed anew in this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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